Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OPW FUELING COMPONENTS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 29 U.S.C. § 157 (Section 7) of the National Labor Relations Act protects union stewards who falsify grievances.

2. Whether 29 U.S.C. § 160 (Section 10) of the National Labor Relations Act gives the National Labor Relations Board the remedial power to order reinstatement of employees who falsify grievances.

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Supreme Court Rule 14.1, Respondent OPW Fueling Components makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? YES

If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party.

Dover Corporation

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 6, 2006.

I.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, issued on April 6, 2006, is reported as 443 F.3d 490 (6th Cir. 2006) and has been included in the appendix on pages 3a - 22a. The Decision and Order of the National Labor Relations Board is reported as 343 NLRB No. 111 (2005) and has been included in the appendix on pages 23a - 28a. The recommended Decision of the Administrative Law Judge is reported as 9-CA-40071, JD-54-04 and has been included in the appendix on pages 29a - 52a. The lower court's Order of July 28, 2006, denying Petitioner's Motion for Rehearing is included on appendix pages 1a - 2a.

II.

JURISDICTION

The Judgment of the Court of Appeals for the Sixth Circuit was entered on April 6, 2006. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on July 28, 2006. This Petition is timely filed according to Supreme Court Rules 13.1 and 13.3. The Court derives jurisdiction from 28 U.S.C. § 1254(1).

III.

STATUTORY PROVISIONS INVOLVED

United States Code, *Title 29*:

Section 157 - Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 158(a)(3) - It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization

Section 160(a) - The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce.

Section 160(c) - No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

IV.

STATEMENT OF THE CASE

This case involves a Decision and Order of the National Labor Relations Board ("the Board"), enforced by a three-judge panel of the Sixth Circuit Court of Appeals, wherein the Board broadened its *Roadmaster* holding and the circumstances under which Section 7 protections will be afforded to union stewards who falsify grievance forms. In *Roadmaster*, the Board granted Section 7 protection to a union steward who signed a grievance form in the interest of a fellow employee who **had** initiated the grievance process, but who was **unavailable** to sign the grievance for himself prior to the expiration of the grievance filing deadline. 288 NLRB 1195 (1988) *enfd.* 874 F.2d 448 (7th Cir. 1989). In its Decision and Order here, the Board granted this same protection to a union steward who falsified the signatures of two employees on a grievance form to the detriment of the two employees who **had not** initiated the grievance process and who were at all times **available** to sign the grievance but were never asked. The Sixth Circuit enforced the Board's Decision and Order.

A. Parties To The Proceedings

The relevant parties to the proceedings below include: (1) OPW Fueling Components ("the Company") - the employer and Petitioner herein; (2) Glass Molders Pottery & Plastic Allied International Union ("the Union") - the union representing the Company's production employees; (3) Logan Cox - the union steward who was discharged for falsifying a grievance; (4) Raymond Mann - bargaining committee chairman; and (5) Larry Grace and Kenny Miller - the two

employees whose names were forged by Cox on the grievance form that is at the center of this dispute.

B. How The Case Arose

The relevant facts are simple and undisputed. On October 15, 2002, the Company met with the Union to discuss the Company's desire to recall ten formerly laid off employees. (Apx. 40).[1] At this meeting, and on behalf of the Union, Logan Cox and Raymond Mann explained to the Company officials present that they had a dispute about the recall provision in the parties' collective bargaining agreement. (Apx. 40, 100-101). Mann agreed with the Company that the employees who had been laid off and not subsequently rehired by OPW Engineered Systems were entitled to recall. (Apx. 41). Cox read the recall provision differently. Cox believed that the recall should be done regardless of whether the formerly laid off employees were currently employed at OPW Engineered Systems. (Apx. 41). Implementation of the Company's and Mann's interpretation would result in the recall of those employees who were "on the street," i.e. those who had not been rehired by OPW Engineered Systems following their layoff from the Company. (Apx. 41). Implementation of Cox's interpretation would result in the recall and transfer of several employees currently working at OPW Engineered Systems, including Larry Grace and Kenny Miller, both of whom had been laid off from the Company in May of 2002 and then subsequently hired by and currently working at OPW Engineered Systems. (Apx. 41-42).

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[1] Reference to "Apx." is to the record established before the ALJ and used by the Board and the Sixth Circuit on appeal. It does not refer to the Appendix attached to this Petition.

Mann and Cox agreed that they would consult with the International Union's lawyers to resolve their disagreement and then notify the Company of the Union's official position. (Apx. 41). Several days passed with no word from the Union. (Apx. 43). The Company thereafter announced that it would recall those employees who were "on the street." (Apx. 43). The announcement was made on October 17, 2002. (Apx. 43).

Five days after the Company's announcement, Cox filed a written grievance falsely on behalf of Larry Grace and Kenny Miller. (Apx. 43-44). In preparing the grievance, Cox filled in the administrative information at the top of the grievance form. (Apx. 46, 72). He then took the grievance form to Denny Brock, another bargaining unit employee, to prepare the text of the form, which consisted of a specific description of the nature of the grievance. (Apx. 45). After Brock finished, Cox took the grievance to his desk and falsely signed Grace's and Miller's names on the line entitled "Aggrieved Employee." (Apx. 45-47, 73, 245-246). He did so apparently using two different writing styles and without ever consulting with either Grace or Miller. (Apx. 75-76, 137-140). Cox then submitted the grievance to Edwin Chaney, another union steward, for union approval. (Apx. 45-47). Once he had approval from Chaney, Cox officially submitted the forged grievance to the Company's night-shift supervisor, who ultimately sent the grievance to the Company's HR Manager. (Apx. 45-47, 77). As a matter of course, the Company's HR Manager in turn faxed the grievance to Mary Hedge, who was the HR Manager at OPW Engineered Systems where Grace and Miller worked. (Apx. 161).

When Hedge received the grievance, she became suspicious about its authenticity because it was commonly

understood that Grace and Miller were happy at OPW Engineered Systems and had no desire to return to the Company, which would be the result if Cox's grievance was successful. (Apx. 51, 117-118, 121, 190). When she approached Grace about the grievance, Grace told her that he did not file a grievance and that no one had consulted him about the recall. (Apx. 48). When she contacted Miller, he had a similar response. (Apx. 161). Upon being notified, both Grace and Miller were outraged that a grievance had been filed on their behalf. (Apx. 48, 103). In Cox's own words, Grace and Miller were "raising hell about their names being on the grievance." (Apx. 49). Grace immediately confronted Mann and demanded that the grievance be changed. (Apx. 48). Later Grace and Miller filed internal complaints with the Union demanding an investigation into Cox's conduct, an investigation that was later conducted by the Union. (Apx. 325, 337-378).

At the same time, the Company began its own investigation. (Apx. 55-56). At the conclusion of the investigation, the Company confirmed what Grace and Miller had told Hedge: (1) Grace and Miller did not sign the grievance; (2) Grace and Miller were happy at OPW Engineered Systems; (3) Grace and Miller did not want to return to the Company; (4) Grace and Miller never spoke to Cox; (5) Cox never attempted to contact Grace or Miller about the grievance; (6) Cox never requested or attempted to obtain permission from Grace or Miller to sign their names to the grievance; (7) Cox told no one in the Union or at the Company that he had signed Grace and Miller's names to the grievance prior to submitting it; (8) Cox had one union employee prepare the text of the grievance, and then out-of-sight from everyone, he signed Grace and Miller's names; and (9) Cox appeared to have signed Grace's name using one type of pen and one style of handwriting, but appeared to

have signed Miller's name using a different type of pen and a different style of handwriting. (Apx. 45, 61, 71, 73, 137-140, 116, 374, 388). With these facts, none of which are or have been disputed, Cox was discharged for violating the Company's policy against document falsification.

C. The ALJ's Findings And The Boards Decision And Order

The ALJ found that:

- "Cox was motivated in filing the grievance by nothing more than his sincerely held good-faith belief that his interpretation of the collective-bargaining agreement was correct." (Apx. 4).

- there was "no evidence that Cox would, or could, profit or gain anything from deceiving the Respondent." (Apx. 4).

- there was "no evidence that Cox held any resentment or had any reason to be vindictive towards the named employees." (Apx. 4).

- "the reality of the grievance process in this case is such that no union official, especially not one as experienced as Cox, could possibly think that such a blatant deception could achieve any objective." (Apx. 4).

Based on these findings, the ALJ relied on the Board's *Roadmaster* decision and ruled that "Cox's act of signing employees' names to a grievance was part and parcel of the grievance procedure and as such was protected concerted

activity." (Apx. 4). The Board affirmed the AJJ's rulings and findings without any analysis whatsoever. (Apx. 13-14).

D. The Decision Of The Sixth Circuit Court Of Appeals

The Sixth Circuit on appeal enforced the Board's Decision and Order. Like the ALJ below, the Court based it decision on an application and extension of the Board's *Roadmaster* decision. Specifically, the Court held that, under the facts of the case, Cox had neither the intent nor the ability to deceive the Company and, therefore, his conduct was protected by Section 7 of the NLRA. For that reason, the Court further held, the Company violated 8(a)(3) of the NLRA by terminating Cox for falsifying the grievance ("extension of *Roadmaster*").

V.

REASONS FOR GRANTING THE WRIT

A. The Board's And Sixth Circuit's Extension Of *Roadmaster* Cannot Be Reconciled With The Foundational Principle Of The NLRA

In *City Disposal*, the United States Supreme Court identified an explicit foundational principle underlying, and essential to, the NLRA: "the encouragement of collective bargaining and other 'practices fundamental to the friendly adjustment of industrial disputes arising out of differences in wages, hours, or working conditions.'" *NLRB v. City Disposal*, 465 U.S. 822, 834 (1984) *citing* 29 U.S.C. § 151; *see also Andrews Company*, 87 NLRB 379, 380 (1949) ("Congress enacted the National Labor Relations Act in 1935 with the expressed intent to prevent industrial strife and promote industrial peace"). This principle is embodied in and

furthered by various provisions in the NLRA. Sections 8(a)(5), 8(d), and 8(b)(1)(A) are the most obvious. Section 8(a)(5) and 8(d) require that employers and unions collectively bargain in good faith and "in an honest and sincere effort to reach agreement on mutually acceptable terms." *Akron Novelty Man. Co.*, 244 NLRB 998, 1001 (1976). Section 8(b)(1)(A) demands that unions fairly and honestly interact with their membership, particularly in contract creation and contract enforcement. *Electrical Workers v. NLRB*, 307 F.2d 679, 683 (D.C. Cir. 1962) ("[a]mong the most important of labor standards imposed by the Act as amended is that of fair dealing, which is demanded of unions in their dealings with employees"). Each of these three provisions place primary importance on good faith and honesty and the stabilizing effect such fundamental notions have on industrial relations.

Allowing employees to falsify grievances or, in any way, dishonestly process grievances, even if their dishonesty is not accompanied by an intent or ability to deceive, flies in the face of these fundamental notions. *Mascali Construction Co.*, 289 NLRB 1155 (1988) (recognizing that rewarding dishonesty undermines the remedial purposes of the Act); *Allis-Chalmer Man. Co.*, 70 NLRB 348, 350 (1946) ("[t]he purpose of the Act is to protect the organizational rights of employees; its purpose is not to protect incompetence, dishonesty or disloyalty"). Indeed, facilitating the friendly adjustment of industrial disputes requires that the parties act honestly and in good faith in their dealings with the other party. Imagine the implications of the Sixth Circuit's extension of *Roadmaster*, an extension that now permits, if not condones, misrepresentations, forgery, and dishonesty during the grievance process. Employers, in such an environment, will have no assurances that union officials are honestly processing grievances or that the union officials

represent the interests of the signators of the grievance. Instead, the *Roadmaster* extension allows a union official to falsify a grievance form, knowing that he has no right to do so, knowing that he has not received authorization from the alleged or actual grievant, and possibly even knowing that the grievant does not wish to grieve the employer's actions, as long as there was no intent to deceive the employer. Who, when caught, will admit they had an intent to deceive? Placing a stamp of approval on such conduct will reek industrial havoc, interject suspicion and skepticism into the union-employer relationship, and tear at the stabilizing forces of honesty and good faith that are at the heart of the NLRA. Trust is paramount. Without it, the goal of achieving the "friendly adjustment of industrial disputes" is unattainable. This Court must act to avoid the likely deterioration of labor relations that will follow from the Sixth Circuit's extension of *Roadmaster*. Section 7 simply cannot be interpreted in a way that sacrifices a principle that has long been recognized as fundamental to the NLRA.

The deleterious impact of the *Roadmaster* extension on industrial relations is more than speculation and rhetoric. Consider the events that transpired immediately following the revelation that Cox had falsified Grace and Miller's signatures. Two employees, happy with their jobs at OPW Engineered systems, turned, in the General Counsel's words, "irrate." They demanded answers. They demanded accountability. They demanded that Cox no longer represent them in any union matter. They even initiated internal union proceedings against Cox. An investigation was conducted by the Union and the Company, other innocent union officials were questioned and implicated, and resources and time were unnecessarily wasted by both the Union and the Company (Co. Exhs. 2 and 3; Apx. 48-49, 103, 377-378). These events are the logical and practical consequence of an

interpretation of Section 7 that ignores fundamental notions of honesty and good faith. For this reason alone, this Court should grant certiorari and consider the Sixth Circuit decision.

B. The Board's And Sixth Circuit's Extension of *Roadmaster* Cannot Be Reconciled With Section 10(c) Of The NLRA

Not only does the ruling in this case stretch Section 7 beyond its foundational principles, it also directly conflicts with Section 10(c) of the Act. *Roadmaster* stands for a simple but legally flawed proposition: a union steward who falsifies a grievance will be protected by our national labor laws from discharge if there is evidence that the falsification involves neither the intent nor ability to deceive the employer. In other words, forging an unavailable aggrieved employee's name without their knowledge constitutes "protected activity" under Section 7 of the NLRA. The Board and Sixth Circuit here have extended this holding to provide protection to union stewards who sign the name of employees, even though the employees were not aggrieved, did not initiate the grievance process, and were readily available for consultation about the matter grieved. Indeed, unlike in *Roadmaster*, Grace and Miller did not initiate the grievance process, they did not consider themselves aggrieved (and were, in fact, happy where they were working), they were never consulted about the recall, they never even knew about the recall, and the grievance, if successful, would have been contrary to their personal interest of remaining at OPW Engineered Systems. Yet Cox forged their names on the grievance form anyway, an action the Board and the Sixth Circuit found "protected."

Because Cox's conduct was given the status of protected activity, an employee can no longer be discharged for such conduct. This is true even when the falsification contravenes

a clearly written, known, and consistently enforced company anti-falsification policy, like the policy that was in place here. As the law now exists, there is an irrebuttable presumption that an employee's discharge for falsifying a grievance constitutes a discharge without cause. The logical and legal consequence is that a mere falsification can never constitute "cause" for discharge for purposes of section 10(c). It necessarily follows that the Board is free to order reinstatement under section 10(a) for such conduct, depriving an employer from defining "cause" for discharge. The Sixth Circuit's opinion here bears this out: "[t]he mere act of signing another employee's name on a grievance form . . . does not constitute 'cause' under section 10(c)." The Sixth Circuit has effectively given the Board the remedial authority to reinstate an employee who is discharged for falsifying a grievance, irrespective of the factual situation. This is certainly bad policy. Even worse, however, the Sixth Circuit has given the Board more remedial authority than did Congress under section 10 of the NLRA.

Section 10 of the NLRA is the statutory source of the Board's remedial authority. It allows the Board to "devise[] remedies that will effectuate the policies of the Act." *Labor Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). The Board's remedial authority is "a broad discretionary one . . . ." *Id.* It is not unlimited however. Section 10(c) of the NLRA places a clear limitation on the Board's remedial authority. That section provides that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged . . . if such individual was suspended or discharged for **cause**." 29 U.S.C. § 160(c) (Emphasis added). Thus, if an employee is discharged for "cause," the Board is statutorily prohibited from ordering the employee reinstated.

Addressing the meaning and limits that the statutory term "cause" places on the Board, the Supreme Court has held that "the legislative history of . . . [10(c)] indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct." *Fibreboard Paper Products Corp. v. NLRB*, 378 U.S. 203, 217 (1964). In so holding, the Court relied on H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947), which provides in relevant part that: "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to **shop rules**, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement." (Emphasis added). Stated another way, an employee who interferes with a coworker in contravention of a "shop rule . . . will **not** be entitled to reinstatement." *Id.* (Emphasis added).

This is exactly what occurred in this case. The Company had an anti-falsification rule. (Apx. 70). Cox admitted that he was aware of the rule. (Apx. 70). He conceded that he knew that a violation of the rule subjected him to discharge. (Apx. 70). He also knew that other employees had been discharged pursuant to it. (Apx. 70). And, it is beyond dispute that Cox's action interfered with two other employees, Grace and Miller, who turned, in the General Counsel's words "irate," demanding answers, demanding accountability, and even demanding that Logan Cox "no longer represent [them] in any union matter." (Apx. 48-49, 103, 377-378). Because he falsified their signatures, Cox was discharged for violating a "plant rule" (the Company's anti-falsification rule), the violation of which interfered with other employees. Based on the meaning supplied by the legislative history of 10(c) and recognized by this Court, Cox was, without a doubt,

discharged for "cause." Yet the Sixth Circuit's opinion, which enforced the Board's reinstatement order, has done what section 10(c) prohibits: authorized reinstatement when an employee has been discharged for statutory "cause."

This result starkly highlights the conflict between section 10(c) and the extension of *Roadmaster* here. It does not leave open the possibility that an employee, like Cox, can falsify a grievance in a way that constitutes sufficient "cause" for discharge. This inflexibility cannot be reconciled with section 10(c) because it gives, under the right set of circumstances - like here, the Board more remedial authority than it was given by Congress. Neither the Board nor the Sixth Circuit can adopt a blanket, inflexible rule which provides that "[t]he mere act of signing another employee's name on a grievance form . . . does not constitute a 'cause' under Section 10(c)." By doing so, the Board and the Sixth Circuit have established a rule that directly conflicts with section 10(c) of the NLRA. For this reason too, the Court should grant certiorari.

VI.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-2563; 05-1083

[Filed July 28, 2006]

OPW FUELING COMPONENTS, Petitioner/Cross-Respondent,	)
v.	)
NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.	)

Before: SILER and GRIFFIN, Circuit Judges; COOK, District Judge.*

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* The Honorable Julian Abele Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-2563; 05-1083

[Filed April 6, 2006]

OPW FUELING COMPONENTS,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

On Petition for Review and Cross-Application for Enforcement of a Decision of the National Labor Relations Board-Region 9
No. 9-CA-40071

Before: SILER and GRIFFIN, Circuit Judges; COOK, District Judge.*

* The Honorable Julian Abele Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

COOK, District Judge. This appeal involves a petition for the review of a final administrative decision by the National Labor Relations Board - Region 9 ("NLRB"). In this case, the Petitioner and Cross-Respondent, OPW Fueling Components ("OPW-FC" or "Company"), appeals an order by the NLRB on December 16, 2004, which determined that the discharge of a former employee, Logan Cox, was in violation of sections 8(a)(1), (3), and (4) of the National Labor Relations Act ("NLRA" or "Act"). *See* 29 U.S.C. §§ 158(a)(1), (3), and (4).

I.

There are two corporations involved in this litigation. The first corporation, the OPW-FC, manufactures gas nozzles for use in service stations. The OPW-FC's sister corporation, the OPW Engineered Systems ("OPW-ES"), manufactures and sells liquid handling equipment, such as truck and railcar loading arms. The employees of these two corporations are represented by the Glass, Molders, Pottery & Plastic Allied International Union whose collective bargaining relationship with management dates back to the early 1960s.

Logan Cox had worked for the OPW-FC for twenty-eight years until his discharge from the Company in November 2002. During his employment, he was represented by the Union and served as its union steward and as a bargaining committeeman. In his capacity as a bargaining committeeman, Cox assisted the Union in its negotiations with the Company which resulted in the formation of a new collective bargaining agreement on September 16, 2002. He was also responsible for the filing and the processing of grievances, as well as participating in all of the "third step" stage grievance

hearings. Apart from one minor work-related incident (i.e., an unauthorized absence from work violation in 1979), for which he received a verbal warning, Cox maintained a positive relationship with his employer. On September 24, 2002, less than two weeks after the parties' new collective bargaining agreement became effective, Cox, acting on behalf of the Union, filed an unfair labor practice charge with the NLRB which accused the OPW-FC of unilaterally changing its practice and policy for compensating those employees who perform union business on company time. The matter was subsequently settled between the parties without any official action by the NLRB.

Approximately three weeks later (October 15, 2002), Thomas Ciepichal, the OPW-FC's vice-president of operations, and David Orewiler, its human resource director, met with Cox and other union representatives, including Raymond Mann, the Union's bargaining committee chairperson, to discuss the recall status of fourteen employees who had been laid off or transferred in May 2002. However, during these discussions with management at this meeting, Mann and Cox openly expressed their differences of opinion over the recall rights provision in the collective bargaining agreement. It was Mann's view that this recall provision should be interpreted so as to give priority to those employees who had been laid off in May 2002 over their fellow workers who had been transferred to the OPW-ES. On the other hand, Cox took the position that the collective bargaining agreement required the Company to give priority of recall to the fourteen employees on the basis of their rights of seniority. Cox, with recognition that he and Mann had a genuine disagreement over the interpretation of the recall provision in the collective bargaining agreement, advised Orewiler, among other things, that it was imperative that the International Union be given a reasonable amount of time in which to evaluate this issue. The

Company agreed. However, two days later (October 17, 2002), and without waiting for a response from the International Union, the OPW-FC announced that it would recall the laid-off workers and, in turn, would not give recognition to the seniority rights of those employees who had been subject to its transfer directive in May 2002.

Believing that the Company had (1) broken its verbal commitment to wait for a reasonable period of time in which to receive an interpretation of the challenged provision from the International Union and (2) violated the terms of the collective bargaining agreement, Cox and Mann discussed the merit of filing a grievance against the OPW-FC. On October 23, 2002, the last day on which a timely grievance could be filed under the terms of the collective bargaining agreement, Mann authorized Cox to file a grievance. Armed with this authorization, Cox, with the drafting assistance of a union steward, Denny Brock, prepared a grievance form that would challenge the Company's decision to disregard the existing seniority rights of those employees who had been laid off in May 2002.

After Brock had finished writing the text of the grievance, Cox completed the balance of the form by identifying "Local 45-B" as the "Grievant" and listing other requisite information.[1] As a supplement to text, Cox affixed the names and the signatures of two of the involuntarily transferred employees (Larry Grace and Kenny Miller) above the line marked "Aggrieved Employee" without seeking or acquiring

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[1] The information that was supplied by Cox included such things as the plant location, grievance number, date of the violation, date on which the grievance was filed, as well as an identification of the article, section, and page number of the collective bargaining agreement that was allegedly violated.

their permission. He also signed his name over the line marked "Union Official." Edwin Chaney, a union committeeman, acting upon Cox's request, signed the grievance as the second union official.[2]

After completing the grievance form, Cox gave it to his supervisor, who, in turn, placed it on the desk of her supervisor, Ronnie Tolliver. When Tolliver arrived at work on the following morning (October 24, 2002), he was surprised to see the signatures of Grace and Miller on the grievance form because it was "basic shop knowledge" that both of these workers were quite content at the OPW-ES. Tolliver took the grievance form to Orewiler who, in turn, contacted Mary Hedge, the OPW-ES's human resource director. She, along with Mann, talked to Grace and Miller, both of whom denied having given Cox any authority to place their names on the grievance form. Thereafter, Mann recommended to Cox that the names of these two workers be removed and replaced with "Local 45-B" as the aggrieved employee. Cox complied with his suggestion.

At a later time on the same day, Cox asked Orewiler's assistant, Melissa Wolff, to accept this modified version of the grievance form as a replacement of the original document. She declined to do so and referred him to Orewiler, to whom he sought to explain the situation.[3] Cox, who had never

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[2] Chaney maintains that he was unaware that the Grace and Miller had not signed the grievance.

[3] According to Cox, he stated that "these guys are raising hell about their names being on the grievance. So I took their names off, put '45B' on, and I would like the grievance processed. The initial body of the grievance has not changed and it needs to be processed." Orewiler purportedly responded by saying that "this is

denied having signed the names of Grace and Miller to the grievance form, was suspended pending an investigation by the Company. On the same day, a member of the OPW-FC staff spoke with Chaney, who denied having affixed the names of Grace and Miller to the grievance form. In a letter on November 8, 2002, the OPW-FC officially terminated Cox, citing his alleged violation of the Company's Code of Conduct and plant rules relating to the falsification of records.[4]

Cox challenged his discharge, and, during the "third step" grievance meeting in mid-December 2002,[5] Orewiler commented that "we need to settle this thing. But you have already made Mr. Ropp mad with the little thing at the Labor Board." (J.A. at 17.)

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highly unusual. And I'm not too happy with the way things are going here. I am going to speak to your chairman, Raymond Mann, and see what can be done about your activity."

[4] The only other unknown fact that was uncovered during this investigation related to Chaney's lack of involvement in the unauthorized inclusion of the two employees, Grace and Miller. Thus, it appears that the OPW-FC utilized October 28th through November 8th in an effort to ascertain the Company's past disciplinary practices in similar incidents. The research by the Company resulted in the identification of only one incident in which an employee with six years of seniority was discharged for "Falsification of FMLA Medical documentation submitted."

[5] The OPW-FC was represented by Orewiler and Ciepichal at this meeting. The Union was represented by Mann, Chaney, Jim Miller, a union committeeman, and Wesley Royster, a representative of the International Union.

During a meeting in the early part of January 2003 between management and the Union about a matter that is unrelated to this controversy,[6] Ciepichal proclaimed the Union "had already made Mr. Ropp mad with [its] charges at the Labor Board." *Id.* He also warned the Union that "if [it] didn't find some way of working together [with the Company] there could be a possibility that more work would be moved out, and maybe the whole plant."[7] *Id.*

Shortly thereafter, the Union filed an unfair labor practice charge against the Company, alleging that the termination of Cox was an act of retaliation for his filings of (1) the September 24, 2002 unfair labor practice charge and (2) the recall-rights grievance form. The Union also charged the OPW-FC with having "threatened employees that if [they] continued filing charges with the NLRB, [the Company] would not bring work back into the plant." (J.A. at 294.) Administrative Law Judge John T. Clark agreed with the Union. The OPW-FC appealed. On December 16, 2004, the NLRB adopted his ruling, findings and conclusions of law on all grounds, finding that the OPW-FC had violated sections 8(a)(1), (3), and (4) of the NLRA. An appeal by the Company to this Court followed.

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[6] During this meeting, the OPW-FC was represented by company officials Ciepichal, Orewiler, James Gregory Pierson, and Tolliver. The Union was represented by bargaining committee members Mann, Miller, Chaney, Larry Perkins, and Ralph Roche.

[7] Ciepichal denies having made the statements which were attributed to him by Mann.

II.

In essence, the OPW-FC asserts that (1) the findings of fact by the NLRB are not supported by substantial evidence, and (2) the NLRB's application of *Roadmaster v. NLRB*, 288 N.L.R.B. 1195 (1988), *enfd.* 874 F.2d 448, 452 (7th Cir. 1989), to this case is misplaced. We address each of these arguments in turn.

A. The Board's Findings

1. Standard of Review

In its position as the Petitioner in this litigation, the OPW-FC carries the burden of persuading this Court that the findings of fact by the NLRB are not supported by "substantial evidence." 29 U.S.C. 160(e) ("The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."). In interpreting this phrase, the Supreme Court has held that substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (internal quotation marks and citation omitted).

This Court has given, and will continue to give, significant deference and weight to the findings of fact by the Board and its "application of the law to the facts." *NLRB v. Ohio Masonic Home*, 892 F.2d 449, 451 (6th Cir. 1989). Moreover, "we are not free to substitute our judgment for that of the Board simply because we would have made a different decision had we heard the case *de novo* . . . ." *NLRB v. Pipefitters Union Local No. 120*, 719 F.2d 178, 181 (6th Cir. 1983). Other circuits have held that the Board's determination

that an employee's conduct remains protected under the Act would be upheld "so long as it is not illogical or arbitrary." *See, e.g.*, *Roadmaster*, 874 F.2d at 452. Nevertheless, as the Supreme Court declared in *Universal Camera Corp.*, "the Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." 340 U.S. at 490.

Therefore, we must decide whether there is substantial evidence to support the Board's findings that (1) the conduct of Cox under these circumstances is a "protected activity" under Section 7 of the Act; (2) the OPW-FC terminated him on the basis of an improper motivation (i.e., anti-union animus); and (3) the Union was threatened by the Company during the January 6, 2003 meeting.

a. Cox's Conduct is Protected Activity Under Section 7 of the Act

Section 7 of the Act provides a guarantee to employees that they have a "right to self-organization, to form, join, or assist labor organizations, . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157. This Act protects these rights by prohibiting employers from engaging in "unfair labor practices." Moreover, the Act defines "unfair labor practices," in relevant part, as "discrimination in regard to . . . any term or condition of employment to encourage or discourage membership in any labor organization," *id.* § 158(a)(3), and as a "discharge or otherwise discrimination against an employee because he has filed charges . . . ," *id.* § 158(a)(4). More generally, an

unfair labor practice is any activity that "interferes with, restrains, or coerces employees in the exercise of the rights guaranteed in section 157 . . . ." *Id.* § 158(a)(1).

Filing a grievance is a protected activity under Section 7 of the Act. *See NLRB v. City Disposal Systems*, 465 U.S. 822, 836, 104 S. Ct. 1505, 79 L. Ed. 2d 839 (1984). "Naturally, this protection extends to a union steward or official who aids another employee in filing a grievance." *Roadmaster*, 874 F.2d at 452. However, "if an employee engages in indefensible or abusive conduct, his otherwise concerted activity will lose its protection [under the Act]." *Id.* Therefore, as in *Roadmaster*, the issue here is whether Cox's "filing of grievance[] became *unprotected* concerted activity because he signed the names of other individuals on [it]." *Id.* (emphasis in original).

As noted in *Roadmaster*, "[t]he motive of an employee is relevant in determining whether he engaged in protected concerted activity." *Id.* at 453. The facts surrounding *Roadmaster* are nearly identical to the facts in the appeal before this Court. The *Roadmaster* court held that the union steward's conduct did not constitute forgery and, therefore, was a "protected concerted activity" under the Act because he (1) acted in good faith and for legitimate reasons and (2) did not have an intent to deceive his employer.

Here, Judge Clark found, and the Board affirmed, that Cox was acting in good faith and for a legitimate reason, which was "to preserve the Union's right to pursue what he believed was the correct interpretation of the recall provision in the collective-bargaining agreement." (J.A. at 4.) Cox's good faith conduct was demonstrated by the absence of evidence that he "would [have] . . . profit[ed] or gain[ed] anything from deceiving [the OPW-FC]." *Id.* Furthermore,

the administrative law judge determined, and the Board also affirmed, that Cox had no intent to deceive his employer. Judge Clark reasoned that

> no union official, especially not one as experienced as Cox, could possibly think that such a blatant deception could achieve any objective. Under the very best scenario the ruse would be discovered when the employees were told to return to their former positions, and the chance of the deception progressing that far is slight, if at all. Management knew that the employees did not want to return to OPW-FC, and Cox made it clear to Orewiler that he would file a grievance if the recall was not corrected or if the Union was not allowed time to obtain input from the International. If his intent was to deceive, it is doubtful that he would give advanced notice of the deception, nor is there evidence that anyone was either deceived or harmed by his action.

Id.

In *NLRB v. Aquatech, Inc.*, we held that the function of the Board is "to resolve questions of fact and credibility, and this court ordinarily will not disturb credibility evaluations of the Board or an administrative law judge who has observed the witnesses' demeanor." 926 F.2d 538, 544 (6th Cir. 1991). Therefore, in light of Judge Clark's rationale as well as the limited standard of review of this Court, we conclude that the findings of the Board are supported by substantial evidence on the record as whole.

Notwithstanding, the OPW-FC urges this Court to find that the conduct of Cox is not protected by the rationale of *Roadmaster* because of his intent to deceive the Company.

Foremost, the OPW-FC points out that

> Cox did not attempt to consult with Grace and Miller, nor did he seek to obtain permission to sign their names, despite having sufficient time to do so. . . . The clear implication is that Cox actively concealed his intentions from Grace and Miller because he, as did everyone else, knew that they were happy at OPW ES, and would never sign or consent to [the] grievance . . . .

Pet'r./Cross-Resp't's Br. at 25. However, three observations run counter to the OPW-FC's argument. First and foremost, the Company and the Union knew that Grace and Miller were content with their work environment at the OPW-ES. Thus, given the well known satisfaction of these two workers, it is doubtful that Cox possessed a belief that he could deceive anyone at the OPW-FC into believing otherwise by signing their names on the grievance form. Furthermore, there is no evidence that the signatures of these two employees were necessary in order for the Union to challenge the Company's recall decision. Hence, it seems unlikely that Cox would have risked his credibility as a union official and a twenty-eight-year employee to deceive the Company without any personal gain to him or the Union. Finally, notwithstanding the OPW-FC's contention, Cox did not have a sufficient amount of time in which to approach Grace and Miller for their signatures. Under the circumstances of this case and according to the terms of the collective bargaining agreement, the Union had a limited amount of time in which to file a grievance claim. While Cox waited for a response from the International Union, he was not given permission to file a grievance until the 23rd of October when Mann gave him authority to do so.

Next, the OPW-FC argues that Cox's intent to deceive is demonstrated by the fact that he signed the names of Grace and Miller in different styles and with different pens in an effort to induce the "eventual reader of the grievance that it was genuinely prepared by . . . [each of them]." Pet'r./Cross-Resp't's Br. at 28. Although the Board did not specifically address this issue, the Company's argument must be rejected for same reasons that have been noted above; namely, the facts in this case strongly suggest that it is extremely doubtful that Cox intended to deceive the OPW-FC's management. Furthermore, even if we were of the opinion that these facts demonstrate Cox's intent to deceive, the view of this Court would not warrant the disturbance of the NLRB's contrary-but otherwise reasonable-conclusion. *See Universal Camera Corp.*, 340 U.S. at 477. Nonetheless, the OPW-FC contends that the behavior of Cox after his initial filing of the recall-rights grievance form clearly demonstrates an intent by him to deceive. The Company points to Cox's contact with Orewiler's assistant which, in its opinion, represents a blatant attempt "to process the modified grievance and reacquire the forged one." Pet'r/Cross-Resp't's Br. at 28. The Board did not consider this fact to be significant enough to address it. As a postscript, the Court notes with interest that it was Mann, the Union official, who instructed Cox to "white out" the names of Grace and Miller and insert "Local 45-B" as the aggrieved employee.

b. The OPW-FC Terminated Cox Based on an Improper Motivation

The Board also adopted Judge Clark's conclusion that Cox's wrongful termination was motivated by his filing of the grievances, in violation of Section 8(a)(1), (3) and (4). Accordingly, the burden shifts to the OPW-FC to "demonstrate that the adverse action would have taken place

even in the absence of the protected conduct." *NLRB v. Talsol Corp.*, 155 F.3d 785, 797 (6th Cir. 1998) (quoting *NLRB v. E.I. DuPont De Nemours*, 750 F.2d 524, 529 (6th Cir. 1984)) (internal quotation marks omitted).

Here, the OPW-FC contends that Cox was fired because he falsified a "company document." However, Judge Clark found (and the Board concurred) that the OPW-FC's proffered reason was simply a pretext for its anti-union animus. In making his finding, Judge Clark gave significant weight to (1) the disproportionate punishment that Cox, who had been given only one verbal warning for an unauthorized absence from work during his twenty-eight years of employment with the Company, received for a relatively insubstantial and easily correctable "mistake"; (2) the coincidental timing of the grievance filings of Cox and his subsequent discharge; and (3) the credibility of Mann's testimony regarding the comments by the OPW-FC during the meetings in December 2002 and January 2003.[8] In noting that an employer's actual motivation may be shown through circumstantial evidence, *see Talsol Corp.*, 155 F.3d at 798, and given our limited standard of review, we find that the Board's determination (i.e., the OPW-FC's proffered justification was a pretext) is supported by substantial evidence.

Moreover, Judge Clark notably did not categorize the grievance form as a "company document." He correctly found that "Article 14, section 3, step 1, of the collective-

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[8] The Board accepted the determination by the Judge Clark that the witnesses whose testimony ran counter to Mann were not credible because they were untruthful given their "demeanor when testifying." (J.A. at 18.)

bargaining agreement . . . states that once a grievance is reduced to writing the grievance becomes the property of the union bargaining committee." (J.A. at 17) Therefore, the OPW-FC's contention on this issue is without merit.

The OPW-FC also attempts to justify the discharge of Cox on the basis of its earlier termination of another employee who had falsified medical documents. In rejecting this comparison, Judge Clark quoted from *Roadmaster*:

> "Gardner's [the discharged union officer] signing of other individuals' names to grievance forms is distinguishable from the falsification of medical excuses, . . . offenses that the Respondent had used as a basis for discharge of employees in prior years. Gardner's actions . . . merely initiated a procedure through which personnel decisions would later be determined. He derived no personal benefit from his conduct; nor did it in itself have any substantive consequence. By contrast, the falsification of medical excuses, employment applications, or other personnel records affect the substantive aspect to employee-employer relationship because the Respondent may rely on this information in making personnel decisions about the individuals in question."

(J.A. at 17) (quoting *Roadmaster*, 288 N.L.R.B. at 1196) (alterations in original). Judge Clark concluded, and we agree, that "[t]he identical statement can be made about the [OPW-FC's] contention in this case." *Id.*

c. The OPW-FC Threaten the Union in Violation of Sections 8(a)(1) and (4)

Moreover, the Company challenges the Board's adoption of Judge Clark's finding that the OPW-FC threatened the Union during a meeting in January 2003 in violation of Section 8(a)(1) when Ciepichal stated, "if we didn't find some way of working together there could be a possibility that more work would be moved out, and maybe the whole plant." (J.A. at 17.) In making this finding, Judge Clark found Mann's testimony to be credible, notwithstanding Ciepichal's denial. He further took account of the "personal interests of each witness in the outcome of the case," noting that "it [was] Cox who disagreed with Mann, and Mann testified that he told Cox, after the fact, that he should not have put the names of the employees on the grievance." (J.A. at 18.) Judge Clark also observed that "[Mann's] demeanor [is] . . . that of a reliable and trustworthy witness, who was striving to tell the truth to the best of his ability." *Id.* Although Larry Perkins, another union official who attended the January 2003 meeting, denies having heard Ciepichal make the threat, Judge Clark concluded that Perkins' testimony was not believable. (J.A. at 18.) The Board adopted Judge Clark's observations.

Nevertheless, the OPW-FC argues that the Board erred when it considered the uncorroborated nature of Mann's testimony. In support of this position, it points to *NLRB v. Okun Bros. Shoes Store, Inc.*, as stating, "normally the uncorroborated testimony of an interested party does not amount to substantial evidence of an unfair labor practice." 825 F.2d 102, 106 (6th Cir. 1987). However, the OPW-FC has not shown that Mann is an "interested party" to this litigation. In fact, it was Mann's interpretation of the collective bargaining agreement that was challenged by Cox.

Finally, the OPW-FC submits that under *NLRB v. International Automated Machines, Inc.*, 285 N.L.R.B. 1122 (1987), the Board erred when it failed to draw an adverse inference from the Union's failure to call other attendees at the meeting to verify the accuracy of Mann's statement. *International Automated Machines* stands for the proposition that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *Id.* at 1123. However, this argument by the OPW-FC must fail because the Board is only required to recognize that "an adverse inference *may be drawn*." *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 907 (6th Cir. 1997) (quotation marks and citation omitted). As we observed in *Torbitt*, "[s]imply because the Board chose not to draw the adverse inference in this instance does not require this court to disturb that decision." *Id.*

Therefore and with recognition that (1) the administrative law judge had an opportunity to assess the credibility of each witness, *see Aquatech, Inc.*, 926 F.2d at 544, (2) the personal interests of each witness supports his findings, and (3) the Board's conclusions are supported by substantial evidence, this Court affirms the Board's findings which determined that the OPW-FC made a threat to the Union during the January 2003 meeting.

B. The Board's Reliance on *Roadmaster*

Although the OPW-FC's argument that Cox is not entitled to protection under *Roadmaster* because it was his intent to deceive the Company has already been discussed and rejected, it submits as an alternative argument that *Roadmaster* was wrongly decided and should not be adopted by this Court.

As an initial matter, we find it unnecessary to reach the merits of this argument because of the failure by the OPW-FC to proffer its objections about *Roadmaster* to the Board. Section 10(e) of the Act provides in relevant part that "[no] objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. § 160(e). In *Kitchen Fresh, Inc. v. NLRB*, we determined that "in light of the Board's persistent refusal to [adhere to the particular objection by parties,] . . . the futility of . . . [the] objection amounts to an 'extraordinary circumstance' which excuses the petitioner's failure to object . . . ." 716 F.2d 351, 357 (6th Cir. 1983).

Here, the OPW-FC submits that voicing an objection to the applicability of *Roadmaster* before the Board would have been an act of futility because "it is more likely that the Board would have continued 'pressing its own view of the law . . . .'" Pet'r/Cross-Resp't's Reply Br. at 4 (citing *NLRB v. Goodless Brothers Electric Co, Inc.*, 285 F.3d 102, 107 (1st Cir. 2002)). However, *Kitchen Fresh* contains a set of facts that are inapposite to this case because the OPW-FC has failed to demonstrate that the Board has "persistently refused" to overturn *Roadmaster*. The OPW-FC's observation that the Board has consistently cited *Roadmaster* with approval in the past does not excuse the Company from raising the issue in a timely and proper manner. This contention by the OPW-FC does not persuade the Court that the Board was "committed to pressing its own view of the law," or that it would not have been amenable to reconsidering *Roadmaster*. Notwithstanding the procedural deficiencies of the OPW-FC's positions, the Court will briefly address the merits of these arguments. In its brief, the Company argues that the holding in *Roadmaster* (namely, that a union official's signing of two employees' names on a grievance form is "protected activity" under the

Act so long as the official did not have the intent to deceive) is irrational and inconsistent with the Act. First, it submits that *Roadmaster* undermines the Act's foundational principle of "encouraging . . . collective bargaining and other 'practices fundamental to the friendly adjustment of industrial disputes arising out of differences in wages, hours, or working conditions,' . . . by allowing employees to forge grievances or, in any way, dishonestly process grievances, even if their dishonesty is not accompanied by an intent or ability to deceive their employer." Pet'r./Cross-Resp't's Br. at 21 (internal quotation marks and citations omitted). Foremost, this argument stretches the holding of *Roadmaster*. *Roadmaster*'s holding does not "allow[] employees to *forge* grievances." *Id.* (emphasis added). Rather, the *Roadmaster* case simply defines "forgery." In its development of this definition, the *Roadmaster* court declared that in order to satisfy the standard of a "forgery," the employer must show that the employee had an intent to deceive. Hence, the mere act of signing another employee's name without the requisite intent does not constitute an act of forgery. Thus, this argument by the Company misrepresents the holding in *Roadmaster* and must be rejected.

Moreover, the OPW-FC maintains that the rationale in *Roadmaster* directly "conflicts with Section 10(c) of the Act." *Id.* at 22. Section 10(c) provides that "[no] order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause." 29 U.S.C. § 160(c). Here, the Company maintains that "the Board's rule in *Roadmaster* does what Section 10(c) was designed to prevent: interferes with an employer's unconditional right to discharge an employee for cause." Pet'r./Cross-Resp't's Br. at 23. However, this argument is based upon a false premise;

namely, that Cox's conduct constitutes a "cause" under Section 10(c). The mere act of signing another employee's name on a grievance form without an intent to deceive does not constitute a "forgery," and, thus, it does not constitute a "cause" under Section 10(c).

III.

For the reasons that are stated above, we affirm the findings of the NLRB on all grounds.

APPENDIX C

NATIONAL LABOR RELATIONS BOARD

Case 9-CA-40071

[Filed December 16, 2004]

OPW Fueling Components	)
and Logan Cox	)
	)

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On June 10, 2004, Administrative Law Judge John T. Clark issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the

judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, OPW Fueling Components, Butler County, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraph accordingly.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge found that a "part" of the reason for the discharge of Cox was Cox's filing of a Board charge. We agree. We also conclude that the Respondent has not shown that there were lawful reasons which, by themselves, would have caused the discharge. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[3] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall also substitute a new notice in conformity with the Order as modified.

"(c) Suspending, discharging, or otherwise discriminating against any employees for filing charges with the Board."

2. Insert the following as paragraph 2(f).

"(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 16, 2004

/s/_____
Robert J. Battista, Chariman

/s/_____
Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

I join my colleagues in finding that Respondent discharged Cox in violation of Section 8(a)(3). It is undisputed that Cox signed the employees' names on the union grievance without their permission. However, in the specific context of this case, Cox's conduct was not so egregious as to lose the protection of the Act. Given Cox's protected activity and the Respondent's admission that it was the sole reason for Cox's discharge, I find it unnecessary to engage in a *Wright Line*

analysis and do not rely on the judge's discussion of *Wright Line* or the Respondent's motives.

Because Cox's discharge violated Section 8(a)(3), I find it unnecessary to pass on the judge's finding that Respondent also violated Section 8(a)(4) by discharging Cox in part due to his filing of a Board charge.

Contrary to my colleagues, I do not adopt the judge's finding that Respondent violated Section 8(a)(1) by the alleged threatening statement of its vice president of operations at the January meeting. Four witnesses denied that the statement was made, while only one testified to the contrary, and the General Counsel failed to call any of the other three union committeemen who were present at the meeting. In addition, the judge did not explain why union committeemen Larry Perkins's testimony was discredited. In light of these circumstances, I would not defer to the judge's credibility determinations, which simply referenced reliance on demeanor, without explanation of what in the witnesses' demeanor caused him to credit one witness over the other. I would dismiss or remand the issue for reconsideration and issuance of a supplemental decision.

Dated, Washington, D.C. December 16, 2004

/s/_____
Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT threaten any of you that if you continue to file charges with the National Labor Relations Board, we will not bring work back into the plant.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you because you engage in union or other protected concerted activity.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you for filing charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Logan Cox full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Logan Cox whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Logan Cox, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

OPW FUELING COMPONENTS

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

Case 9-CA-40071

[Filed June 10, 2004]

OPW FUELING COMPONENTS	)
	)
and	)
	)
LOGAN COX, an Individual	)
	)

DECISION

Statement of the Case

JOHN T. CLARK, Administrative Law Judge. This case was tried in Cincinnati, Ohio, September 9, 2003. The charge was filed March 12 and amended on May 29, and the complaint was issued May 30, 2003. The complaint alleges that OPW Fueling Components (the Respondent or OPW-FC) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by threatening employees that if the employees continued filing charges with the National Labor Relations Board (the Board), it would not bring work back into the plant. The complaint also alleges that the Respondent violated

Section 8(a)(1), (3), and (4) when it discharged employee Logan Cox (the Charging Party) for engaging in concerted protected activities and/or filing a Board charge against the Respondent. The complaint was amended at the start of the hearing to correctly allege the year of discharge as 2002. The Respondent denies the alleged violations.

On the entire record, including my observation of the demeanor of the witnesses, and where demeanor is not determinative, on the weight of the respective evidence, established or admitted facts, inherent probabilities, reasonable inferences drawn from the record as a whole, and after considering the briefs filed by the counsel for the General Counsel and the Respondent I make the following

Findings of Fact

I. Jurisdiction

The Respondent is a corporation with an office and place of business in Butler Country, Ohio (Tr. 7). The Respondent is engaged in the production of gas nozzles. During a 12-month period ending May 30, 2003, the Respondent, in conducting its business operations, purchased and received at its Butler County, Ohio facility goods valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Glass, Molders, Pottery, Plastics and Allied Workers' International Union, Local No. 45-B (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Two facilities are involved in this dispute. OPW-FC, the Respondent, manufactures products that are primarily used in gas stations, such as gasoline nozzles. OPW Engineered Systems (OPW-ES) designs, manufactures, and sells, liquid handling equipment, such as truck and railcar loading arms. The companies are 25 miles apart and are separate operating businesses, except for collective bargaining. The Union has represented the production employees of each company since about 1961. In September 2002,[1] the Union, and the companies, jointly entered into a 5-year collective-bargaining agreement (Jt. Exh. 1).

Logan Cox, the Charging Party, is a signatory to the current collective-bargaining agreement, that he helped negotiate as a union bargaining committeeman. Union bargaining committeemen are also responsible for processing grievances and training union stewards. Cox had an employment connection with the Respondent from August 5, 1974, until his discharge on October 28, 2002. During that time Cox was disciplined only once, in 1979, when he received a "verbal contact" for attendance.

Cox filed his initial Board charge on September 24 and he forwarded a copy to David Ropp, the Respondent's president. The charge alleged a unilateral change in the compensation of union representatives for performing union business on company time. At some point between September 24 and the beginning of October, the parties met to discuss the charge.

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[1] All dates are in 2002 unless otherwise indicated.

David Orewiler, the Respondent's director of human resources, and Cox, attended the meeting. During the meeting Orewiler told Cox that from then on, if Cox filed another unfair labor practice charge, it should be sent to him and not Ropp. For an unknown reason the charge was not docketed until October 16. The matter was eventually resolved by the parties.

On October 15 the Respondent told the Union that it intended to recall several employees. In response, Raymond Mann, chairman of the bargaining committee and an employee of OPW-ES, said that there was a disagreement between himself and Cox as to the application of the recall rights contained in the collective-bargaining agreement. Cox believed that employees who had been bumped (involuntarily transferred) from the Respondent to OPW-ES should be recalled to the Respondent. Mann believed that only those employees who were "on the street," (those who had not been bumped to OPW-ES) should be recalled. He added that two of the employees who where bumped to OPW-ES, Larry Grace and Kenny Miller, did not want to return to the Respondent. Mann said that he was going to ask officials of the International Union for their interpretation of the collective-bargaining agreement language and that he would get back to them after he had received the International's reply. The Respondent was noncommittal on the issue but said that time was of the essence.

On October 17 the Respondent announced that it was going to recall the individuals "on the street." On the same day Cox put Orewiler on notice that the Union had not received a response from the International Union and that Cox was still of the opinion that the Respondent's action violated Grace and Miller's seniority rights. Thereafter, Cox and Mann began a dialogue concerning the advisability of filing

a grievance, absent a response from the International, over the recall. On October 23, the last day that a timely grievance could be filed, Mann authorized Cox to file the grievance.

B. Filing of the Grievance and the Events Surrounding the Discharge

During the evening of October 23 Cox asked Union Steward Denny Block to write the grievance. Cox stated that he normally asked Block to write his grievances' because of Block's "good handwriting." The substance of the grievance contends that the Respondent denied employees Grace and Miller their recall rights to OPW-FC, by recalling a less senior employee. The requested remedy is that the Respondent abide by the collective-bargaining agreement and recall Grace and Miller. After Block wrote the body of the grievance, Cox completed the upper section. This section lists Local 45-B as the grievant, the plant location, grievance number, date of the violation, date the grievance was filed, and the article, section and page number of the of the collective-bargaining agreement that was allegedly violated. In the line marked "Signed" over the words "Aggrieved Employee" is, what appears to be, the signatures of Grace and Miller. Cox admitted signing their names without their permission. Cox signed his name over "Union Official" and asked Edwin Chaney, another bargaining unit committeeman, to also sign as a Union Official. Chaney was unaware that the employees had not signed the grievance. Cox presented the grievance to his supervisor, who placed it on the desk of her supervisor, Ronnie Tolliver.

Tolliver was surprised when he saw Grace and Miller's names on the grievance when he arrived at work on the morning of October 24. He stated that it was "basic shop knowledge" that Grace and Miller were happy at OPW-ES.

Tolliver took the grievance to Orewiler. Because the employees were employed by OPW-ES Orewiler contacted Mary Hedge, human resources director for OPW-ES, who in turn went to Mann and they both approached Grace. First Grace, then Miller, denied signing the grievance and stated that they were not grieving the recall issue. Hedge relayed this information to Orewiler. Mann told Cox that the employees were irate and suggested that Cox "white out" the employees' names and insert Local 45-B as the aggrieved employee. Cox complied with the suggestion.

Around 4 p.m., of the same day, Cox went to the human resources office and asked Orewiler's assistant to swap grievances. He explained his request by telling her that the employees were upset because he signed their names to the grievance. She sent him to Orewiler. Cox asked if Orewiler had the grievance. Orewiler said "Yes" and gave Cox the grievance in response to his request to see it. Cox, in return, handed Orewiler the amended grievance and explained that "The guys are raising hell about their names being on the grievance. So I took their names off, put '45B' on, and I would like the grievance processed. The initial body of the grievance has not changed and it needs to be processed." Orewiler said "This is highly unusual. And I'm not too happy with the way things are going here. I am going to get to the bottom of this. I am going to speak to your chairman, Raymond Mann and see what can be done about your activity." (Tr. 30). Cox told him that he was following Mann's instructions and departed.

Cox was suspended on October 28 pending completion of the Respondent's "investigation." Also on October 28 the Respondent spoke with Chaney, the other bargaining unit committeeman who signed the grievance. Chaney denied signing the employees' names and indicated that although he

had signed the grievance he "didn't really read it" (Tr. 160). Chaney's denial was apparently accepted at face value and Cox, who had always admitted and never denied signing the employees' names, was sent a termination letter on November 8. The letter stated that he was terminated for violating the Respondent's Code of Conduct and Plant Rules regarding falsification of records. Although Orewiler signed the letter, the decision was made by Thomas Ciepichal, vice president of operations, with the knowledge of his "boss" (Tr. 186-187, 197), President David Ropp (Tr. 210). The only additional fact resulting from the investigation was Chaney's lack of involvement, and this was known the day Cox was suspended. Thus, it appears that the days between October 28 and November 8, were used to ascertain the Respondent's past disciplinary practice in similar incidents (Tr. 196). The Respondent's research disclosed only one incident where an employee with 6 years seniority was discharged for "Falsification of FMLA Medical documentation, submitted" (R. Exh. 17). Although not apparent from the exhibit, Orewiler testified that the employee was terminated for forging a physician's signature on a document that was part of a leave-of-absence application.

1. Analysis and discussion

Filing a grievance is protected concerted activity within the meaning of the Act. *LB & B Associates, Inc.*, 340 NLRB No. 29, slip op. at 3 (2003). In *Roadmaster Corp.*, 288 NLRB 1195 (1988) enf. 874 F.2d 448 (7th Cir. 1989), the Board found that the signing of employees' names to grievances by a union official was protected concerted activity. Notwithstanding the reasons advanced by the Respondent for its action, the express basis for the discharge was Cox's alleged misconduct arising out of his protected concerted activity. Accordingly, the burden is on the General

Counsel to show that Cox's conduct was not sufficiently serious to warrant discharge. *Detroit News,* 341 NLRB No. 125, slip op. at 5 (2004).

Cox had the testimonial demeanor of a truthful witness. He admits that he should have placed his initials by the employees' signatures, as he did on another grievance, or indicate that the Union was the aggrieved party, as he did on the amended grievance. Cox also exhibited a strong, unyielding, sense of conviction in his beliefs when testifying about the substantive collective-bargaining issues underlying his initial Board charge and the grievance. I have no doubt that Cox was motivated in filing the grievance by nothing more than his sincerely held good-faith belief that his interpretation of the collective-bargaining agreement was correct. He filed the grievance solely to preserve the Union's right to pursue what he believed was the correct interpretation of the recall provision in the collective-bargaining agreement. There is no evidence that Cox would, or could, profit or gain anything from deceiving the Respondent. There is no evidence that Cox held any resentments or had any reason to be vindictive towards the named employees. The Respondent offers that "the only way that Cox could resurrect the settled issue of recall rights was to submit to the Company a bogus grievance that was 'signed' by two employees allegedly grieving the matter." (R. Br. at 26.) The facts are contrary. The amended grievance, which did not contain named employees, was processed by the Respondent. Regardless, the resolution of the grievance, as advocated by Cox, would have gained him nothing.

Even absent my finding that Cox was acting in good faith, the reality of the grievance process in this case is such that no union official, especially not one as experienced as Cox, could possibly think that such a blatant deception could

achieve any objective. Under the very best scenario the ruse would be discovered when the employees were told to return to their former positions, and the chance of the deception progressing that far is slight, if at all. Management knew that the employees did not want to return to OPW-FC, and Cox made it clear to Orewiler that he would file a grievance if the recall was not corrected or if the Union was not allowed time to obtain input from the International. If his intent was to deceive, it is doubtful that he would give advanced notice of the deception, nor is there evidence that anyone was either deceived or harmed by his action.

I find, based on the foregoing, that Cox's act of signing employees' names to a grievance was part and parcel of the grievance procedure and as such was protected concerted activity. *Roadmaster Corp.*, above at 1197. I also find, as set forth above, that his conduct was not sufficiently egregious to remove his grievance-filing activity from the protection the Act. Generally, in cases not turning on the employer's motive, as here, the Board finds it unnecessary to decided whether the Respondent also violated Section 8(a)(3). See, e.g., *Phoenix Transit System,* 337 NLRB 510 fn. 3 (2002). Counsel for the General Counsel submits that because the reason Cox was discharged coincides with his protected grievance-filing activity, he was essentially terminated for engaging in union activity, and as such the discharge alone is evidence of animus sufficient to support a finding of a Section 8(a)(3) violation. *Roadmaster Corp.*, above at 1197. I agree with counsel for the General Counsel's contention, and find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged.

Although a *Wright Line,* analysis, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), is unnecessary, I will address the

Respondent's argument regarding the absence of illegal motive or union animus. Inferences of animus and discriminatory motivation may be drawn from circumstantial evidence rather than direct evidence, including the pretextual nature of the reasons offered for the employee's discharge. *Volair Contractors,* 341 NLRB No. 98, slip op. at 7 and cited cases (2004).

> 'While it is a truism that management makes management decisions, not the Board . . . it remains the Board's role, subject to our deferential review, to determine whether management's proffered reasons were its actual ones.' *Uniroyal Technology Corp. v. NLRB,* 151 F.3d 666, 670 (7th Cir. 1998). And, in making that determination, it is surely appropriate to consider the insubstantial nature of the alleged misconduct. See *Neptune Water Meter Co. v. NLRB,* 551 F.2d 568, 570 (4th Cir. 1977) ('The rule is that if the employee has behaved badly it won't help him to adhere to the Union, and his employer's anti-union animus is not of controlling importance. But if the employee is a good worker and his breach of the work rules trivial, the more rational explanation for discharge may be invidious motivation.').

Detroit Paneling Systems, 330 NLRB 1170 (2000).

Cox had an employment relationship with OPW-FC, or one of its various entities, for over 28 years. During those years he was disciplined once. After spending 3 days attending to the family of a deceased coworker in 1979, he received a "verbal contact" for attendance. According to article 12 of the current collective-bargaining agreement a verbal contact is the least severe corrective action that the Respondent administers, and it is removed after 3 consecutive

months of acceptable attendance. Cox's misconduct, in essence, resulted from an error in judgment. No one was harmed, no damage was done, and Cox neither gained, nor could have gained anything. He admitted his error and made it right. The Respondent issued the most severe punishment possible—discharge. "[T]he quantum of discipline may be explained by an 'invidious motivation.' *Neptune Water Meter Co. v. NLRB,* 551 F.2d 568, 570 (4th Cir. 1967)." *Douglas Aircraft Co.,* 308 NLRB 1217, 1224 (1992).

I find additional evidence of pretext in the Respondent's contention that grievances written on union letterhead become company records merely because the Respondent retains its copy. Article 14, section 3, step 1, of the collective-bargaining agreement (Jt. Exh. 1 at 25) states that once a grievance is reduced to writing the grievance becomes the property of the Union Bargaining Committee. In addition to that clear contract language, part of the Cox discharge grievance specifically alleges that "Orewiler and Tom Ciepichal, agree that a grievance belongs to the Union and that the Union has total responsibility for said documents" (R. Exh. 1). Moreover, in *Roadmaster,* above, even without the clear contract language set forth above, the Board had no difficulty finding as evidence of pretext the discharge of a union officer for falsifying company documents, and those documents were also grievances. "[G]rievance forms. . . written on union letterhead cannot reasonably be considered company documents." 288 NLRB at 1195-1196.

Significantly, the Board in *Roadmaster* also found as pretext, the employer's contention that the signing of another person's grievance by a union official was the equivalent of falsifying a medical excuse. Ibid.

> Furthermore, Gardner's [the discharged union officer] signing of other individuals' names to grievance forms is distinguishable from the falsification of medical excuses,. . . offenses that the Respondent had used as a basis for discharge of employees in prior years. Gardner's actions,. . . merely initiated a procedure through which personnel decisions would later be determined. He derived no personal benefit from his conduct; nor did it in itself have any substantive consequence. By contrast, the falsification of medical excuses, employment applications, or other personnel records affect the substantive aspect to employee-employer relationship because the Respondent may rely on this information in making personnel decisions about the individuals in question.

Id at 1196. The identical statement can be made about the Respondent's contention in this case.

Based on the foregoing I find that the Respondent's asserted reasons for suspending and then discharging Cox are pretextual and I infer that the Respondent proffered the false reason to conceal its real motive which was, in part, because of his protected union activity, specifically his grievance-filing activity. See, e.g., *Lancaster-Fairfield Community Hospital,* 303 NLRB 238 (1991), enfd. 968 F.2d 1215 (6th Cir. 1992); *Roadmaster Corp.,* 288 NLRB 1195 (1988) enf. 874 F.2d 448 (7th Cir. 1989). Accordingly, I find that the suspension and subsequent discharge of Cox violated Section 8(a)(1) and (3) of the Act.

C. The Section 8 (a)(1) and (4) Allegations

Cox filed his first charge with the Board on September 24. Cox filed the charge on behalf of the Union in his

representative capacity as Bargaining Committeeman. (GC Exh. 2.) He forwarded a copy of the charge to David Ropp, the Respondent's president. The charge alleged a unilateral change in the compensation of union representatives for performing union business on company time. At some point after September 24, but before October, the parties met to discuss the charge. David Orewiler, the Respondent's director of human resources, and Cox attended the meeting. During the meeting Orewiler told Cox that from then on if Cox filed another unfair labor practice charge, it should be sent to him and not Ropp. For an unknown reason the charge was not docketed until October 16. The matter was eventually resolved by the parties.

Cox was suspended on October 28, and later terminated, for failure to adhere to acceptable standards of conduct and for falsifying records (GC Exh. 6). He filed the original charge over his discharge, acting as an individual, on March 12, 2003. In mid-December 2002, there was a third-step grievance meeting over his discharge. The Respondent was represented by Orewiler and Thomas Ciepichal, vice president of operations. The Union was represented by Raymond Mann, chairman of the union bargaining committee, Committeemen Edwin Chaney and Jim Miller, and International Union Representative Wesley Royster. Mann testified that after some discussion Orewiler commented that "we need to settle this thing. But you have already made Mr. Ropp mad with the little thing at the Labor Board." Ropp was the "boss," to whom Ciepichal was referring when Ciepichal admitted that he told his boss of his decision to discharge Cox. (Tr. 78-, 186-187, 197, 210).

Mann also testified that in early January 2003 the parties met to discuss returning work to the plant. Ciepichal said that he was working hard to get work back to the plant but that

"we [the Union] had already made Mr. Ropp mad with our charges at the Labor Board." Mann replied that that the Union had to represent people the best way they could. Ciepichal said that "if we didn't find some way of working together there could be a possibility that more work would be moved out, and maybe the whole plant." (Tr. 79-80). In addition to Ciepichal the Respondent was represented by Orewiler, James Gregory Pearson, plant manager (referred to as Gregory), and Ronald Tolliver, business unit manager for dispenser products. The Union was represented by the bargaining committee, Mann, Miller, Chaney, Larry Perkins, and Ralph Roche.

Based on Mann's testimony, and the abrupt timing of Cox's discharge, the counsel for the General Counsel submits that the filing of the charge was a contributing factor in the discharge decision and thus a violation of Section 8(a)(1) and (4). Counsel for the General Counsel also alleges an independent 8(a)(1) violation based on the alleged threatening comment made by Ciepichal combining the concepts of Labor Board charges being evidence of not working together, with loss of work and possible plant closure.

Mann's testimony is the underpinning of the allegations. He is the only to witness to testify that Orewiler and Ciepichal made the statements alleged in the complaint. Orewiler and Ciepichal denied making the statements, and the other management witnesses denied that the statements were made. Larry Perkins, who attended the early January meeting as a bargaining committeeman, testified pursuant to a subpoena, as a witness for the Respondent. He also denied that the statements were made, albeit somewhat less emphatically than the management witnesses, stating, "None that I can recall." "1 hadn't heard any comments like that." "I didn't witness any comments like that." (Tr. 131-133.) Although the

Respondent's witnesses testified consistently with each other, based on my observations of their demeanor when testifying none of the Respondent's witnesses appeared truthful when denying the statements alleged in the complaint.

In addition to demeanor I have carefully weighed all the testimony, keeping in mind the personal interests of each witness in the outcome of the case. In this regard, I have no reason to doubt the veracity of Mann because of his position in the Union, as the Respondent suggests. On the contrary, it is Mann's interpretation of the collective-bargaining agreement that the Respondent implemented. It is Cox who disagreed with Mann, and Mann testified that he told Cox, after the fact, that he should not have put the names of the employees on the grievance. Mann has been employed by OPW for 30 years and has been the chairman of the bargaining committee for 28 of those years. He has been employed by OPW-ES since 1990. I find his demeanor to be that of a reliable and trustworthy witness, who was striving to tell the truth to the best of his ability. I fully credit his testimony. See generally, e.g. *Parts Depot, Inc.*, 332 NLRB 670, 705 (2000). In crediting Mann's testimony I acknowledge the Respondent's argument that at the point in time when Ciepichal mentions charges, Cox had only filed his initial charge. Possibly Ciepichal misspoke, or he anticipated that Cox would file a charge if his unlawful discharge was not rescinded, and the same reaction would be forthcoming. In any case this does not detract from Mann's credible testimony.

Section 8(a)(4) provides that it shall be an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act." The Board's approach to this provision "has been a

> liberal one in order to fully effectuate the section's remedial purpose." *General Services,* 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener,* 405 U.S. 117, 124 (1972). Such an approach is consistent with the Court's acknowledgement that the initiation of a Board proceeding effectuates public policy and, therefore, though Section 8(a)(4), "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Commission,* 389 U.S. 235, 238 (1967).

Metro Networks, 336 NLRB 63, 66 (2001).

Violations of Section 8(a)(4) are analyzed using the analytical framework established by the Board in *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). I have previously found that Cox was discharged for engaging in protected grievance-filing activity. I have also found that the reason offered by the Respondent for the discharge was a pretext.

Orewiler's statement during the third-step grievance meeting makes it clear that the filing of the Board charge was the stumbling block to settling the grievance because the filing of the charge had made President Rupp mad. Notwithstanding the clarity of Orewiler's statement, not a month later, in early January, 2003, Ciepichal again referenced Rupp being mad about the Labor Board charges. The Rupp's continued animosity towards the filing of a Board charge, as voiced by management officials who allegedly were describing his ongoing reaction to the employees, supports the General Counsel's contention that part of the motivation for the Cox discharge was the filing of the Board charge. Accordingly, I

conclude, based on Mann's credited testimony, that the General Counsel has met his burden of establishing that the Respondent also took advantage of the fortuitous filing of the grievance to retaliate against Cox for filing a charge with the Board in violation of Section 8(a)(1) and (4).

Ciepichal also used the January meeting, the purpose of which was to discuss ways to return work to the plant, to equate the filing of Board charges with not working together, the result of which could possibility be that more work would be moved out of the plant. I find that statement to be a threat to the employees, that if they continued to file charges with the Board the Respondent would not return work to the plant, and accordingly, I find that the statement is an independent violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. OPW Fueling Components is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Glass, Molders, Pottery, Plastics and Allied Workers' International Union, Local No. 45-B is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by threatening employees that if they continued to file charges with the National Labor Relations Board, the Respondent would not bring work back into the plant.

4. The Respondent violated Section 8(a)(1),(3), and (4) of the Act by suspending employee Logan Cox on October 28, 2002, and by discharging him on November 8, 2002.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily suspended and discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of suspension to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and it must remove from its files any reference to the unlawful suspension and discharge of the employee.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, OPW Fueling Components, Butler Country, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Threatening employees that if they continue to file charges with the National Labor Relations Board, the Respondent would not bring work back into the plant.

(b) Suspending, discharging, or otherwise discriminating against any employees for engaging in union or other protected concerted activity.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Logan Cox full reinstatement to his former job or, if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Logan Cox whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the unlawful suspension and discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good

cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Butler Country, Ohio, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 ~~consecutive~~ days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 28, 2002.

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[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. June 10, 2004

/s/_____
John T. Clark
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten any of you that if you continue to file charges with the National Labor Relations Board, we will not bring work back into the plant.

WE WILL NOT suspend, discharge, or otherwise discriminate against any of you because you engage in union or other protected concerted activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Logan Cox full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent

position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Logan Cox whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Logan Cox, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful suspension and discharge will not be used against him in any way.

OPW FUELING COMPONENTS
(Employer)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003,
Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3663